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U.S. Department of Homeland Security

Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 MASS, 3/F
425 Eye Street N.W.
Washington, D.C. 20536

[redacted]

File: WAC 01 221 55477 Office: CALIFORNIA SERVICE CENTER Date: FEB 02 2004

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected pursuant to 8 C.F.R. § (a)(2)(v)(B)(1) as untimely filed.

The petitioner is a corporation involved in the development of semiconductors for terabit optical switches and routers. It has 115 employees, an undisclosed gross annual income, and seeks to employ the beneficiary as a senior software engineer. The director denied the petition because the petitioner failed to provide a certified Labor Condition Application (LCA) from the U.S. Department of Labor as required by applicable regulation.

An affected party has 30 days from the date of an adverse decision to file an appeal. 8 C.F.R. § 103.3(a)(2)(i). If the adverse decision was served by mail, an additional three days is added to the proscribed period. 8 C.F.R. § 103.5 (a)(b). The record reflects that the director sent her decision of January 24, 2002, to the petitioner and to counsel at their addresses of record. The appeal was received by Citizenship and Immigration Services (CIS) 36 days later on March 1, 2002. Therefore, the appeal was untimely filed.

An appeal that is not filed within the time allowed must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v)(B)(1). If, however, an untimely appeal meets the requirements of a motion to reopen or reconsider, the appeal must be treated as a motion, and a decision must be made on the merits of the case. 8 C.F.R. § 103.3(a)(2)(v)(B)(2).

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5 (a)(2). A motion to reconsider must: (1) state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or CIS policy; and (2) establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5 (a)(3).

As previously noted, the sole basis for the director's denial of the I-129 petition, was that the petitioner failed to provide a certified LCA with the filing of the initiating petition, or thereafter, when requested by the director. On appeal, counsel states that he did, in fact, provide a certified LCA to the director when requested by the director in the director's request for evidence dated September 18, 2001. The director noted in her decision of January 24, 2002, that the petitioner failed to provide the LCA in its response to the director's request for evidence. On appeal, counsel fails to provide a copy of the LCA or any other evidence corroborating his assertion of prior compliance. As such, the appeal cannot be treated as a motion to reopen or reconsider

since the appeal does not comply with the above cited regulations relative thereto. The appeal will, therefore, be rejected.

As always, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is rejected as untimely filed.